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Massachusetts Association of Criminal Defense Lawyers

June 4, 2015

By US-Mail and email (barbara.berenson@sjc.state.ma.us)

Committee to Study the Code of Judicial Conduct
c/o Senior Attorney Barbara Berenson
John Adams Courthouse
Pemberton Sq.
Boston, MA 02108

Re: MACDL statement on proposed changes to Code of Judicial Conduct (SJC Rule 3:09)

To the Study Committee:

The Massachusetts Association of Criminal Defense Lawyers ("MACDL") respectfully submits these comments on proposed changes to the Code of Judicial Conduct, and appreciates your extending the time to comment. Note that we have -- as requested -- mutually shared our respective comments with Committee for Public Counsel Services ("CPCS"), and we join, endorse, and incorporate their suggestions, but shall not repeat them here, and we are informed they endorse ours.

We propose that the following important portions of the Commentary to the current rules be incorporated in the new rules:¹

I. Although we take no position on where to place the following,² we urge restoring the below Commentary to current Canon 2_(Avoid Impropriety & Appearance of Impropriety ... B. ... not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment):

Commentary: A judge should be careful to avoid developing excessively close relationships with frequent litigants – such as municipal attorneys, police prosecutors, assistant district attorneys, and public defenders – in any court where the judge often sits, if such relationships could reasonably tend to create either an appearance of partiality or the likely need for later disqualification under Section 3E(1)³.

¹ We see no explanation for dropping any of these three Comments, or even whether they were discussed.

² Maybe either new Rule 1.2, "Promoting Confidence ...," or 2.4, "External Influences ..."

³ Of course the reference to section 3E(1) of the current rules needs amendment.

II. For Rule 2.9(A)(5), (Ex Parte Communications ... authorized by law), we urge adding the following Commentary to current Canon 3(B)(7)(e):

Section 3B(7)(e) refers to an ex parte communication authorized by law. Examples include: the issuance of a temporary restraining order in certain circumstances, see, e.g., G. L. c. 209A, § 4 ; Mass. R. Civ. P. 65(a); the issuance of a pre-judgment attachment or trustee process, see Mass. R. Civ. P. 4.1(f), 4.2(g); the determination of fees and expenses for indigent persons, see G. L. c. 261, §§ 27A - 27G; the issuance of temporary orders related to child custody or vacation of the marital home where conditions warrant, see G. L. c. 208, §§ 28A, 34B; and an ex parte communication authorized or required under the Rules of Professional Conduct (S.J.C. Rule 3:07).

We see no explanation of the term “authorized by law” in the proposals, except a specific reference to specialty courts in new Comment 4A.

III. We propose that the following italicized sentence from the Commentary to current Rule 3F be added to the Commentary to Rule 2.11(C) (Disqualification):

A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not hear comment on possible remittal unless the lawyers jointly propose remittal after consultation as provided in the Section. ...

The above comments were discussed at length and unanimously approved by the 1998-2003 Committee to Study the Judicial Code of Conduct (of which the undersigned, Martin Rosenthal, was a member) and were subsequently adopted by the Court. They reflect fundamental fairness, established case law and/or court rules and provide important guidance to judges.

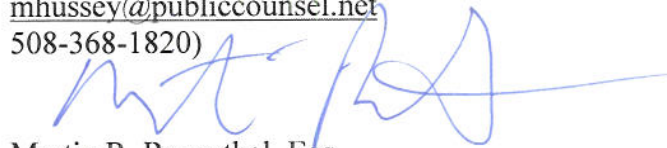
Respectfully submitted,



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